BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996.

Docket No. RT-00000F-02-0271

POST-HEARING REPLY BRIEF OF THE RESIDENTIAL UTILITY CONSUMER OFFICE

I. INTRODUCTION

The core agreements cited by the Residential Utility Consumer Office in its Post-Hearing Brief ("RUCO's Brief") should have been filed with the Commission. This is not a case about an ILEC that entered into agreements in the normal course of business that it *mistakenly, but in good faith, did not file with the Commission. This is a case about a* company that entered into a series of back-room deals favoring chosen CLECs that expressly agreed with (and sometimes promoted) Qwest's regulatory positions and then kept those agreements secret so that other CLECs could not benefit from them.

As RUCO detailed in its brief, the record in this case leads to four inescapable conclusions: (1) Qwest entered into each of the core agreements, including the oral discount agreement with McLeod; (2) each of the core agreements should have been filed with the Commission under 47 U.S.C. §252; (3) Qwest and Eschelon and Qwest and

McLeod engaged in an arguably criminal scheme to defraud this Commission; (4) the parties' egregious conduct requires the imposition of remedies.

Documents are the DNA evidence of this case. From the agreements themselves, to the more than 40 documents directly referring to the McLeod discount, to the documents signed by Qwest asking Eschelon to help it manipulate the 271 process, the documents admitted into evidence in this case prove by much more than a mere preponderance of the evidence that Qwest and McLeod and Qwest and Eschelon have engaged in a long pattern of intentional misconduct related to the core agreements. Moreover, the documents corroborate and support the testimony of *every witness proffered* by RUCO, in addition to the testimony of Blake Fisher, McLeod's chief negotiator - whose testimony is corroborated by, not only McLeod's internal documents and correspondence from McLeod to Qwest, but also by Qwest's internal documents and correspondence from Qwest to McLeod.

Qwest's Post-Hearing Memorandum ("Qwest's Brief"), on the other hand, is filled with unsubstantiated personal attacks on RUCO's witnesses, red-herring hypotheticals and broad, unsupported proclamations of good faith on the part of Qwest – most of which warrant no response.

Moreover, based on the evidence in the record, Qwest's arguments lack a firm grounding in law or fact. As set forth in this reply, there is nothing in Qwest's Brief that should lead this Commission away from the four inescapable conclusions described above.

II. THE EVIDENCE IN THE RECORD ESTABLISHES THAT QWEST AND McLEOD AND QWEST AND ESCHELON SCHEMED TO DEFRAUD THE COMMISSION.

Qwest complains throughout its brief that RUCO has failed to meet its burden of showing that Qwest entered into discriminatory agreements with Eschelon and McLeod to provide preferential pricing terms. Qwest argues that RUCO's evidence is speculative and that RUCO's conclusions rely on faulty logic and are unsupported by fact. Qwest's Brief at 43. Qwest is critical of RUCO's witnesses, claiming they had no personal knowledge of the facts and little to no experience with the regulations at issue. Qwest's Brief at 23. Specifically, Qwest argues that RUCO witness Clay Deanhardt's testimony is inadmissible because Mr. Deanhardt is not qualified to make opinions[1]. Qwest's Brief at 24. Ms. Diaz Cortez' testimony argues Qwest was the product of "deep-seated partiality and preconceptions". Qwest's Brief at 30.

Despite what Qwest perceives, Mr. Deanhardt and Ms. Diaz Cortez simply interpreted the plain meaning of the voluminous documents to reach their conclusions. The core facts in this case were presented through the documents as well as the deposition testimony of witnesses who actually negotiated the agreements. Those facts were documented long before the hearing. Likewise, those facts were simple and uncomplicated and present this Commission with a straightforward fraudulent scheme case.

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[1] RUCO is at a loss to understand Qwest's argument regarding Mr. Deanhardt. The ALJ previously ruled against Qwest's Motion *In Limine* to exclude Mr. Deanhardt's testimony. Qwest continued to object unsuccessfully to the admission of Mr. Deanhardt's testimony at the hearing. Transcript, Volume III at 590:16-25. In Qwest's post-hearing brief, Qwest again requests that the "Court" ask itself whether Mr. Deanhardt has the requisite qualifications to render opinions in this matter. While it appears that Qwest is asking the ALJ to reconsider her ruling, Qwest has not filed a corresponding motion. Nonetheless, RUCO will not respond to Qwest's argument regarding Mr. Deanhardt since the ALJ has already ruled.

For example, the draft agreement between Qwest and McLeod, which preceded the October 26, 2000 agreements, includes language in Section 2 stating: **"[consider whether there are other specific terms or provisions to add to this language to avoid "pick & choose"]"** R-1B, CD-32 at 3. The only interpretation of that statement is that *prior to the October 26, 2000 agreements, the parties were considering* language to avoid other CLECs from being able to opt in to the terms being considered. R-1B, CD-36 (ninth page) is a Qwest accounting document dated April 3, 2001 which states, in relevant part: "This is to reduce UNE-Star revenues for 10% discount that will be issued to Eschelon and McLeod should they meet they're [sic] revenue/volume commitments per the UNE-Star contract". Here, the only interpretation is that Qwest was reducing UNE-Star revenues by the 10% discount for Eschelon and McLeod. There are numerous documents in evidence that have statements as simple and uncomplicated as the above two examples. This is the type of evidence upon which Ms. Diaz Cortez and Mr. Deanhardt have drawn their conclusions and is not subject to misinterpretation, as Qwest would suggest. Attacking Ms. Diaz Cortez and Mr. Deanhardt's conclusions based on their qualifications is a red-herring argument.

Nonetheless, Qwest maintains throughout its brief that the evidence presented by RUCO and Staff should be discounted because their witnesses did not have first-hand knowledge of what happened. Qwest's Brief at 31, 32, 41. On the other hand, Qwest suggests that its witnesses are more reliable since they had first-hand knowledge and presented unrebutted testimony that demonstrated that Qwest took steps to ensure CLECs were not discriminated against. Qwest's Brief at 30. RUCO agrees that this Commission must consider the witnesses that Qwest presented at hearing and the weight to be afforded their testimony. For the following reasons, RUCO requests that the Commission

discount the testimony of Qwest's witnesses as a whole and specifically with regard to the oral discount agreement, RUCO requests the Commission draw a negative inference regarding Qwest's failure to produce testimony corroborating its denial of the oral discount agreement with McLeod.

At the heart of this matter was the oral discount agreement that Qwest had with McLeod (as well as the discount agreement with Eschelon). Qwest has maintained and continues to maintain that it did not enter into an oral agreement with McLeod for a discount. Qwest's Brief at 45-46. The affidavit and deposition of Blake Fisher and the affidavit of Lori Deutmeyer evidence the existence of the oral discount agreement. R-1B, MDC-2C, CD-4, R-1C, MDC-1E. Mr. Fisher, McLeod's Regional President for the Western Region and chief negotiator of the oral discount agreement, provides detailed testimony of the circumstances surrounding and execution of the oral agreement. Id. Lori Deutmeyer, McLeod's Local Line Cost Manager, explains in detail how the discount was accounted for and the transfer of payments. R-1C, MDC-1E. This evidence should be given considerable weight since it is McLeod's employees testifying against McLeod's interests.

According to Audrey McKenney, Qwest's Senior Vice President of Wholesale Markets at the time, and one of Qwest's primary wholesale contract negotiators at the time, Qwest never entered into an oral agreement with McLeod. R-1C, MDC-3B at 5:11-6:25. Ms. McKenney testified in her deposition taken in Minnesota on June 11, 2002, that the discount amounts represent the shortfall of what Qwest owed McLeod for purchases under the take-or-pay agreements. R-1B, MDC-3B at 48:14-52:24. Qwest has not changed its position, nor offered testimony in Arizona regarding the oral agreement of any other Qwest employee who negotiated the core McLeod agreements.

The Minnesota Public Utilities Commission considered Ms. McKenney's testimony in the Minnesota proceeding and found:

> 336. The testimony of Audrey McKenney that Qwest did not enter into a discount agreement with McLeod is not credible. Ms. McKenney would not directly answer questions from the Department or the Court asking whether Qwest had ever offered McLeod a discount. In addition, the substantial majority of the documents in evidence were created contemporaneously with the events at issue and directly contradict Ms. McKenney's testimony. Finally, Ms. McKenney offered Eschelon financial incentives to (a) withhold information from regulators that may be relevant to Qwest's Section 271 applications, and (b) covertly assist Qwest in manipulating various regulatory proceedings. There is a real question about her respect for the regulatory process. [Footnotes omitted]

ALJ's report at 46, ¶ 336 adopted by the Minnesota Commission in its' Minnesota Order.

In the proceedings before this Commission, Qwest admitted that it understood that it would be defending itself at the hearing against allegations of regulatory violations. Qwest's Brief at 22. Qwest also knew that a central focus of the hearing would be the oral discount agreement Qwest had with McLeod and the discount agreement Qwest had with Eschelon. Qwest's Brief at 40. Given that Qwest's only witness in the Minnesota hearing on the central issue of the oral discount agreement was previously found to be incredible, it was incumbent on Qwest to present in this hearing a witness with first-hand knowledge of the facts to, at the very least, corroborate Ms. McKenney's testimony. Qwest failed to produce at the hearing a single witness who participated in the actual negotiations of either the McLeod oral discount agreement or the Eschelon[2] core agreements.

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[2] Qwest relies on the testimony of Judith Rixe to support its claim that the Eschelon consulting agreement was legitimate. Qwest's Brief at 41-44. Ms. Rixe, however, although present for some of the negotiations leading up to the execution of the discount agreement, served as a customer advocate and did not negotiate

Qwest cannot complain that it could not produce such a witness because one was not available. In her deposition, Ms. McKenney testified that the following Qwest employees were involved in the negotiations with McLeod which led to the execution of the core agreements: Ms. McKenney, Greg Casey, Jim Gallegos, Arturo Ibarra[3], Freddie Pennington, and Dan Hult. R-1C, MDC-3B at 6:24-7:11. Mr. Fisher adds Stephen Davis as also being present "occasionally" in the negotiations. R-1C, MDC-2C at 2 ¶ 2. While some of these employees are no longer with Qwest, others still are and were available to Qwest as witnesses. Transcript, Vol. 1 at 78:24-25, Q-4, LBB-30. Nonetheless, Qwest failed to corroborate Ms. McKenney's incredible Minnesota testimony, or its position regarding the oral discount with one of these available witnesses at trial.

Given Qwest's failure to corroborate its position, the Commission can only rely for a first-hand account of what happened on the testimony of Ms. McKenney and Mr. Fisher. With regard to the other Qwest negotiators who did not testify at trial, the Commission can infer that their testimony would be against Qwest's interests. In Arizona, failure to present testimony, under certain circumstances, may allow the trier of fact to draw a negative inference (i.e. that the fact being considered is against the non-moving parties' interest). *See Gordon v. Liguori, 182 Ariz. 232, 236, 895 P. 2d 523, 527 (1995), Ponce v. Industrial Commission, 120 Ariz. 134, 135, 584 P. 2d 598, 599 (1978).* When considering whether to draw an adverse inference, the Commission should consider: (1) whether the witness was under the control of the party who failed to call him or her; (2) whether the party failed to

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any of the terms. Transcript, Vol. II at 367:5-369:15. Ms. Rixe did not deal at all with the McLeod account. Id., at 369:16-25.

[3] Mr. Ibarro testified in his deposition that he did not negotiate any of the terms of McLeod Agreement II or McLeod Agreement III. R-1B, MDC-3A at 9:10-18. Mr. Ibarro testified that he was involved in some of the preliminary discussions which led to the discount. R-1B, MDC-3A at 17:7-15.

call a seemingly available witness whose testimony it would naturally be expected to produce if it were favorable; and (3) whether the existence or nonexistence of a certain fact is uniquely within the knowledge of the witness. *Gordon* at 236, 895 P. 2d 527.

Only the individuals at Qwest and McLeod who negotiated the core agreements truly know what the circumstances and terms were. They[4] have unique knowledge of the facts. Qwest has not denied that any of the individuals named by Ms. McKenney or Mr. Fisher negotiated the McLeod core agreements. Qwest could have called another witness who negotiated the agreements to corroborate its position after its primary witness with first-hand knowledge was determined to be incredible.

While Qwest may have had its reasons for not calling a witness, the Commission, however, is free to look at the facts and infer whatever it deems appropriate from Qwest's failure to produce a witness. It is fair for the Commission to infer that the testimony of the Qwest employees who had first-hand knowledge of the oral agreement would be contrary to Qwest's interests since Qwest failed to call them under the circumstances as described above.

[4] Based on Mr. Ibarro's deposition, Mr. Ibarro does not appear to have been involved significantly in the negotiations of the oral discount agreement. Ms. McKenney and Mr. Fisher, however, did recognize Mr. Ibarro's involvement in the negotiations. R-1C, MDC-3B at 6:24-7:11, R-1C, MDC-2C at 2 ¶ 2.

III. THE CORE AGREEMENTS SATISFY THE ACT'S FILING REQUIREMENTS.

A constant theme running throughout Qwest's Brief is that it is just not fair to punish Qwest for failing to file agreements because there was no specific definition of "interconnection agreement" prior to the Interconnection Agreement Order. Qwest posits that *penalizing* it for *misinterpreting* an otherwise vague standard would somehow violate its due process rights. Qwest's Brief at 62-63. When deciding whether the unfiled agreements met the Act's definition prior to the Interconnection Agreement Order, Qwest cautions the Commission from relying on some generalized notion of interconnection. Qwest refers to Justice Potter Stewart's famous definition of pornography, "I know it when I see it," and the possible application of that standard here. Qwest's Brief at 8. However, that standard holds much truth when it comes to the issues here.

In *Jacobellis v. Ohio*, 378 U.S. 528, 84 S.Ct. 1676 (1964), the case from which Justice Stewart's definition is taken, the United States Supreme Court had to determine whether a particular film was obscene and whether a criminal conviction for its possession and exhibition was proper. The majority reversed the conviction based upon the standards the high court established in *Roth v. United States and Alberts v. California*, 354 U.S. 476, 77 S.Ct. 1304 (1957) ("*Roth*"), as well as a viewing of the film. [5]

Roth is instructive here because in it the Supreme Court upheld convictions for mailing obscene matter, despite due process arguments that the criminal statutes failed to give adequate notice of what was prohibited. There the Court stated:

> It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. The federal obscenity statute makes punishable the mailing of

[5] Justice Stewart, having also reviewed the film, agreed with the majority and, referring to pornography generally, wrote in his now-famous concurring opinion, "I know it when I see it, and the motion picture involved in this case is not that."

> material that is "obscene, lewd, lascivious, or filthy***or other publication of an indecent character. The California statute makes punishable, *inter alia*, the keeping for sale or advertising material that is "obscene or indecent." The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.
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> Many decisions have recognized that these terms of obscenity are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. "'***[T]he Constitution does not require impossible standards'; all that is required is that the language "conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices***."
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> *Id.*, at 354 U.S. 491, 77 S.Ct. 1312. (internal citations omitted; other omissions in original).

The Supreme Court went on to find that the "not precise" words in the obscenity statutes gave adequate warning of the conduct proscribed and held:

> That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.
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> *Id.*, at 354 U.S.492, 77 S.Ct.1313.

Just as the standards for obscenity were not too ambiguous to support criminal penalties for violating the obscenity statutes at issue in *Roth*, the standards set out in the statutes and federal regulations for what constitutes an "interconnection agreement" are sufficiently specific here – particularly given the common understanding and practice in the industry – to hold Qwest civilly liable for violating them.

The simple truth is that the question of whether the core agreements constituted interconnection agreements should have been and most likely would have been answered affirmatively by anyone working in the telecommunications industry outside of Qwest (and, perhaps, the CLECs to which it is granting favors). The interconnection terms in the core agreements define how McLeod and Eschelon would pay for interconnection services and

UNEs, how those services would be implemented, and the escalation procedures the parties would abide by. They are, without doubt, terms and conditions of interconnection – and that can be determined, as Justice Stewart succinctly describes, merely by looking at them.

IV. QWEST DOES NOT UNDERSTAND ITS FILING OBLIGATIONS UNDER THE ACT

In its initial post-hearing brief, RUCO explained how Qwest has failed to distinguish the difference between the escalation procedures described in Eschelon Agreement I, McLeod Agreement IV and Qwest's Website and the Implementation Plan. See RUCO's Brief at 19-22. Qwest trivializes the distinction since "All Arizona CLECs received the same level of service." Qwest's Brief at 30, Transcript, Volume II at 337:8-25. The testimony and evidence Qwest relies on to establish this point, however, actually prove that Qwest discriminated. Qwest's Brief refers to the testimony of Dana Crandall who attempts to prove her point by referring to Eschelon's escalation chart attached to the Implementation Plan. Qwest's Brief at 32. That chart, according to Qwest, is identical to the standard escalation chart used for all wholesale customers. Qwest's Brief at 32.

The escalation procedures cited by Qwest begin with the Wholesale Service Representatives and end at the Senior Director / Vice President level. RUCO 11, RUCO 13, deposition exhibit RUCO-3. The six-level procedures in Eschelon Agreement I and McLeod Agreement IV, in contrast, *start* at the Vice President level. RUCO 8, RUCO 13, deposition exhibit RUCO-4. In other words, Eschelon and McLeod's deals allowed them to start where every other CLEC ends. This clearly demonstrates that Qwest's failure to make the escalation procedures in Eschelon Agreement I and McLeod Agreement IV

available to other CLECs discriminated against those CLECs in violation of 47 U.S.C. §251.

Finally, Qwest's arguments regarding the escalation procedures are contrary to common sense. If, as Qwest says, all CLECs are being treated equally, then there would be no reason for Qwest to actively seek to conceal an agreement that it claims is not distinguishable from the escalation procedures described on its website or in the Implementation Plan it had with Eschelon. Transcript, *Vol. II* at 337:20-25. Likewise, there would be no purpose in keeping the agreement confidential if there really was no distinction between the agreement, the website or the Implementation Plan. Id. Moreover, if the escalation procedures on Qwest's website really are adequate, neither Eschelon nor McLeod would have felt the need to have a different set of procedures reduced to a written agreement.

V. THE EVIDENCE ESTABLISHES THAT QWEST'S CONSULTING AGREEMENT WITH ESCHELON WAS A SHAM

Qwest contends that "unrebutted" testimony of Judith Rixe established that Eschelon Agreement II contains a legitimate "consulting" agreement and not a thinly veiled discount. In particular, Qwest relies on the testimony of Ms. Rixe, who, according to Qwest, actually participated in the meetings in which the parties negotiated Eschelon Agreement II. Qwest's Brief at 41.

The testimony of Ms. Rixe can only be considered "unrebutted" if the Commission ignores the clear evidence from the documents created contemporaneously with the agreement that shows the consulting agreement to be a discount. Likewise, to be considered unrebutted, the Commission would also have to ignore Eschelon's

interpretation of the consulting agreement. According to Eschelon, Qwest began to breach the consulting agreement "...and treat it as a sham almost immediately." S-13 at 3, footnote 3. RUCO discusses the evidence that supports its position in its initial post-hearing brief at Section VI(C)(1) and will not repeat that discussion here.

Moreover, Ms. Rixe's testimony regarding the meaning of the agreement itself further supports RUCO's position that the consulting arrangement was a sham. Ms. Rixe admits that the agreement provides that if Eschelon did not meet its purchase commitment, then Qwest would get back every penny of the discount it paid to Eschelon. Transcript, Volume II at 425:3-425:8. Ms. Rixe also admitted that the agreement provides that in the event of termination, Eschelon would pay back all the money that Qwest had paid it for consulting services. Transcript, Volume II at 423:16-424:2. The Commission does not have to go any farther in its consideration than interpreting the agreements themselves. No business arrangement would include such uncertain and unforgiving terms if it were legitimate.

RUCO does not dispute that Eschelon did some work to help Qwest roll out DSL resale for Eschelon. RUCO does however, dispute that the work performed by Eschelon had any relationship at all to the 10% refund Qwest agreed to give Eschelon. The documents in this case show that Qwest agreed to give Eschelon a discount. The self-serving testimony of Qwest's witnesses cannot change the nature of that agreement.

VI. THE COMMISSION HAS JURISDICTION TO IMPLEMENT REMEDIES UPON McLEOD AND ESCHELON.

Both Eschelon and McLeod maintain that their behavior is not the subject of this docket and therefore, it would be improper to impose remedies against them. See Initial

Brief of Eschelon Telecom of Arizona, Inc. ("Eschelon's Brief") at 1-3, and Comments of McLeodUSA Telecommunications Services, Inc. ("McLeod's Brief") at 1-2. McLeod contends that it was not a formal party in this docket and that due process and fundamental fairness preclude the Commission from imposing remedies. McLeod's Brief at 1. Eschelon states that it has never received notice that its rights, privileges and property would be at risk in this proceeding. Eschelon's Brief at 4 and Eschelon Telecom of Arizona Inc.'s Prehearing Statement ("Prehearing Statement") at 2. However, McLeod and Eschelon were parties to this proceeding, and action by the Commission against McLeod and/or Eschelon would not deny either party due process of the law.

McLeod and Eschelon were parties to this docket. A "party' is one who is directly interested in the subject matter of the docket or some part thereof, who has a right to make defenses, control proceedings, and examine and cross-examine witnesses. *Chalpin v. Mobile Gardens, Inc., 18 Az. App. 231, 237, 501 P. 2d. 407, 410 (1972)*[6]. It is thus not the formalization of the existence of the 'party' status by order of the Commission which makes a utility a 'party' to the action, but rather, it is the right to appear and contest which is controlling. This right comes into existence upon subjecting itself to the jurisdiction of the Commission. *Chalpin at 237, 501 P. 2d. 410.* Clearly, McLeod and Eschelon both had the right to appear and contest the allegations made against them. Furthermore, Eschelon, among other things, subjected itself to the jurisdiction of this Commission by submitting letters to the Commissioners regarding its position on the core issues. R-1B, CD-62, deposition exhibits RUCO 11 and RUCO 12. Both letters detail the problems

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[6] *Chalpin* was overturned for other reasons in *Switzer vs. Superior Court in and for the County of Maricopa, 176 Ariz. 285, 288, 860 P. 2d 1338, 1341 (1993).* The same Court (Court of Appeals, Division 1) cited *Chalpin* for the same point made in this Reply in 1996 in *State v. Zaman, 187 Ariz. 81, 87, 927 P. 2d 347, 353 (1996),* which was also overturned for other reasons.

Eschelon was experiencing with Qwest regarding service and pricing, and respond to Qwest's interpretation of what happened. At no time did this Commission deny either McLeod or Eschelon an opportunity to participate in the proceedings at whatever level they chose. Both parties had the opportunity to present testimony and witnesses, and cross-examine other party witnesses. Eschelon, in fact, did conduct cross-examination during the hearing. For example, see Transcript, Volume II at 327. Not only were McLeod and Eschelon on notice as to the allegations against them, they had the right to appear, they in fact did appear and participate and therefore are parties over whom the Commission has jurisdiction.

Moreover, both McLeod and Eschelon had notice and an opportunity to be heard. Neither party can reasonably complain that their due process rights were somehow violated based on a lack of notice and/or an opportunity to be heard. In general, the Due Process Clause requires that individuals receive notice and a reasonable opportunity to be heard. *McBride Cotton and Cattle v. Veneman, 290 F3d. 973, 982 (D. Ariz, 2002).* RUCO brought to the attention of this Commission the conduct of Eschelon and McLeod in this matter dating back to the procedural conference held on June 19, 2002. Transcript of Proceedings, June 19, 2002 at 39:12-44:14. Shortly thereafter, Eschelon wrote a series of letters to Commissioners' Spitzer and Irvin on June 24, 2002 and July 10, 2002 responding to the Commissioners' "letters to the Parties" in the Section 252 and Section 271 proceedings. R-1B, CD-62, deposition exhibits RUCO 11 and RUCO 12. On August 29, 2002, RUCO filed its Comments and Report wherein RUCO alleged that there were reasonable grounds to believe that Qwest and Eschelon and Qwest and McLeod engaged in a scheme to deceive this Commission. See RUCO's Comments, August 29, 2000. Copies of the Report were sent to Eschelon and McLeod. Id. At the September 19, 2002

procedural conference, both McLeod and Eschelon appeared through their attorneys. See Transcript of Proceedings, September 23, 2002 at 3:2-10. At that conference, before McLeod and Eschelon, RUCO made known again that the only issue was whether McLeod, Qwest and Eschelon made misrepresentations to the Commission concerning the unfiled agreements and, as a result, did the parties discriminate against other, non-party, CLECs. Id., at 18:13-19. McLeod and Eschelon continued to receive correspondence as well as participate in the proceedings after that point through the present. Neither McLeod nor Eschelon can reasonably argue that they were not aware or given notice that their conduct was under consideration in this proceeding. Nor, given the opportunities both parties had to present witnesses and participate, can either party claim that the process was unfair. The Commission's procedure did not violate either McLeod or Eschelon's right of due process.

VII. QWEST, McLEOD AND ESCHELON'S EGREGIOUS CONDUCT REQUIRES REMEDIES

The overwhelming record of evidence set out in this docket establishes beyond a reasonable doubt that Qwest knowingly and intentionally violated 47 U.S.C. §251 and §252. The evidence also shows that Qwest, McLeod and Eschelon[7] engaged in conduct to manipulate regulatory proceedings in Arizona whereby Qwest favored certain CLECs who supported Qwest's regulatory positions to the detriment of those CLECs that did not.

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[7] Interestingly, both McLeod and Eschelon, while maintaining that they should not be subject to penalties for their past conduct in this docket, are somehow entitled to benefit prospectively from the results of their past conduct. McLeod and Eschelon's Brief.

That evidence, and RUCO's analysis of it in its initial post-hearing brief, directly refutes the majority of Qwest's arguments against the imposition of penalties.

Throughout Qwest's penalty analysis set forth in its Brief, one thing is readily apparent: Qwest continues to remain in denial that it violated the law and refuses to accept responsibility for its conduct. Rather, Qwest prefers to discredit the overwhelming evidence presented in this docket by innuendo and facts and law which are dubious at best. For example, in its discussion of the proportionality of penalties that the Commission must consider, Qwest attempts to make its point by comparing a fine of $5,000 upheld by the FCC for extinguished tower lights and faded paint on the company's tower. Qwest's Brief at 51. Among the remedies being considered by the Commission in this case are a $15 million penalty for major corporate malfeasance and providing like discounts to non-party CLECs which will undoubtedly amount to millions of dollars. Qwest's arguments regarding proportionality simply do not make sense and should be discounted entirely.

Qwest claims it is ironic that Qwest is being criticized for trying to accommodate the needs of particular CLECs. Qwest's Brief at 54. Qwest rationalizes that sizable penalties are unwarranted because accommodating CLECs is the purpose of the Act. Id. Qwest's circular logic simply ignores the record. Qwest should know that the Act does not encourage granting undisclosed preferential rates to CLECs or discouraging CLECs from participating in regulatory proceedings. Qwest's arguments are even counterproductive to its own position. To suggest those arguments, Qwest must truly believe that providing undisclosed preferential rates and services to certain CLECs, as well as secretly forcing those CLECs from participating in regulatory proceedings, encourages the principles of the Act. The Commission must impose penalties that will ensure Qwest understands its conduct was unlawful and will not be tolerated in Arizona.

RUCO's remedies are fair and reasonable in this case. It is difficult, if not impossible, to quantify the harm done by the discriminatory conduct engaged in by Qwest, McLeod and Eschelon. Therefore, RUCO suggests remedies which would have the effect of undoing, to the extent possible, the harm done to Arizona's competitive landscape. Implicit in RUCO's approach are recommendations to ensure no party engages in similar conduct.

The purpose of RUCO's two-part fund is to assist the Commission in the implementation of the Act. The notion of this fund, contrary to Qwest's argument, is to provide a safeguard and deterrent to future malfeasance. This purpose is consistent with RUCO's argument that Qwest engaged in unlawful conduct in the past and that safeguards must be established to make sure it does not happen again.

The first part of the Fund would be used to cover Commission's costs of monitoring competitive conditions in Arizona and resolving issues related to the Act. R-1A at 24:6-9. The second part of the fund would cover the out-of-pocket costs the CLECs and other parties would incur when participating in proceedings before the Commission. Id., at 24:15-19. Qwest would contribute most of the Fund, supplemented by one-time contributions from Eschelon and McLeod for their involvement in this matter. Id., at 24:21-25:18 and 48:5-16. This remedy would encourage Qwest to cooperate and provide a mechanism that the Commission can use to enforce the Act. It would also allow CLECs access to an unbiased, third party without fear of reprisal. In other words, this remedy would help to level the playing field.

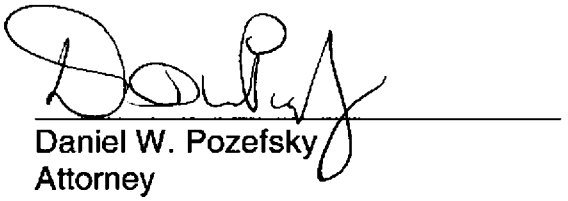
Regarding RUCO's other recommendations, RUCO set forth its arguments in its Initial Brief and adopts them by reference. Again, the purpose of those proposals was to

provide the Commission with mechanisms to remedy injuries to the competitive market place.

VIII. CONCLUSION

The documents at the core of this case, including the agreements themselves, show that Qwest engaged in a repeated pattern of entering into secret agreements to favor certain CLECs (McLeod and Eschelon) that would promote Qwest's regulatory agenda to the detriment of those that would not. Qwest, McLeod and Eschelon knew and intended that their secret agreements remain undisclosed in order that they may achieve the maximum benefits possible. Each party acted with total disregard to the state of competition in Arizona as well as the law. Qwest, in particular, remains in absolute denial that it violated the law, despite the overwhelming evidence and adverse findings by the Minnesota Public Utilities Commission. Qwest continues to mock the evidence and trivialize these proceedings. The Commission should act swiftly and aggressively in order to drive the point home to Qwest, McLeod and Eschelon that their illegal and criminal behavior will not be tolerated in Arizona.

RESPECTFULLY SUBMITTED this 15^{h} day of May, 2003.



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of the foregoing filed this 15th day
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